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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JON M. GUNDERSON,

Plaintiff and Respondent,

v.

RICHARD WALL et al.,

Defendants and Appellants.

B204268

(Los Angeles County
Super. Ct. No. BC338658)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed in part and reversed in part.

Ivie, McNeill & Wyatt, Rickey Ivie, Jennifer R. Jacobs, and Davida M. Frieman for Defendants and Appellants Richard Wall and Welded Fixtures, Inc.

Brown & White, Thomas M. Brown, Kenneth P. White, and Jennifer S. Keh for Defendant and Appellant Christopher Gruys.

Baute & Tidus, Jeffrey A. Tidus, David P. Crochetiere, and Patrick M. Maloney for Plaintiff and Respondent Jon M. Gunderson.

Respondent Jon M. Gunderson (“Gunderson”) filed suit against appellants Richard Wall (“Wall”), Welded Fixtures, Inc. (“Welded”), and Christopher Gruys (“Gruys”) (collectively, “Appellants”) for violation of the California Uniform Fraudulent Transfer Act (UFTA) (Civ. Code,¹ § 3439 et seq.). The gravamen of Gunderson’s complaint was that Gruys fraudulently transferred to Wall and Welded approximately \$1.3 million in funds that belonged to Gunderson. Following a jury verdict in his favor, Gunderson was awarded compensatory damages against Wall and Welded, and punitive damages against Wall, Welded and Gruys. For the reasons set forth below, we conclude that substantial evidence supported the verdict against Wall and Welded for compensatory damages on the fraudulent transfer claim, but not the awards of punitive damages. We further conclude that the trial court abused its discretion in issuing a discovery sanction order that precluded Gruys from presenting any evidence or cross-examining any witnesses at trial based on his invocation of the Fifth Amendment privilege against self-incrimination during discovery. We accordingly affirm in part and reverse in part the judgment, and remand the matter for further proceedings consistent with this opinion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Monetary Transfers Between Gunderson, Gruys And Wall

Gruys was a tax attorney and accountant. Gunderson and Wall were both small business owners and clients of Gruys. Gruys first met Gunderson in the late 1980s. Between 1993 and 2003, Gruys provided financial and tax services to Gunderson and Gunderson’s family-owned business, Outdoor Media Group, a company that manufactured billboard signs. Gruys’s services included preparing the personal tax returns for Gunderson and the corporate tax returns for Outdoor Media Group.

Gruys also met Wall in the late 1980s. Wall is the sole owner of Welded, a company that designs and manufactures retail display racks. Over the years, Wall became

¹ Unless otherwise stated, all further statutory references are to the Civil Code.

a client and close friend of Gruys. Gruys prepared Wall's personal tax returns, and starting in 1996, he also prepared the corporate tax returns for Welded. In 2002, Gruys was the best man at Wall's wedding.

Between November 2001 and February 2002, Wall made three wire transfers of money to Gruys. He initiated the first transfer on November 30, 2001, by requesting his bank transfer \$500,000 to Gruys from Welded's account. One week later, on December 7, 2001, Wall requested an additional \$50,000 transfer from Welded to Gruys. Two months later, on February 11, 2002, Wall requested a transfer of \$1.5 million to Gruys from Welded's account. Each of these wire transfers was completed in accordance with Wall's request. According to Wall, the first two transfers totaling \$550,000 were loans to Gruys so that he could buy certain real property in Santa Barbara, and the third transfer of \$1.5 million was an additional loan. Wall retained records of the wire transfer requests and confirmations. However, apart from these records, there were no promissory notes or other documents reflecting the terms of the purported loans.

In or about May 2003, Gunderson sold the assets of Outdoor Media Group. In connection with the sale of his company, Gunderson consulted with Gruys about a possible tax savings plan. Gunderson and Gruys agreed to a plan under which Gunderson would transfer the proceeds from the sale to a company formed by Gruys called I.R.S.C.E., and Gruys would then cause I.R.S.C.E. to return those funds to Gunderson. It was Gunderson's understanding that the sole purpose of I.R.S.C.E. was to receive and return his funds. Starting in May 2003, Gunderson began transferring various sums of money to I.R.S.C.E. in accordance with the tax savings agreement, and he ultimately sent approximately \$39 million to Gruys' company over a six-month period. Gruys in turn caused I.R.S.C.E. to transfer most of that money back to Gunderson, but later refused to return \$7.5 million of Gunderson's funds.

On July 21, 2003, Gruys caused I.R.S.C.E. to issue a check payable to Welded for \$1.2 million. In a prior action, Gruys testified that the check was a repayment of the principal on the loans made by Welded. Wall, on the other hand, offered conflicting accounts about the purpose of the check. At trial, Wall testified that the check was a

partial repayment on the loans from Welded, and consisted of \$1,050,000 in principal and \$150,000 in interest. At his deposition, however, Wall testified that he did not charge Gruys any interest on the loans that Welded began making in November 2001. Although Wall characterized a portion of the July 2003 payment as interest at trial, Welded did not disclose any interest income in its 2003 tax returns.

In September 2003, Gruys asked Wall to purchase a vacant lot adjacent to Gruys's residence in Santa Fe, New Mexico. Gruys told Wall that he wanted to purchase the property so that the view from his residence could remain unobstructed, but that the owners were not willing to sell it to him. According to Wall, he and Gruys orally agreed that Wall would purchase the property in his own name and then transfer it to Gruys. On October 24, 2003, Wall bought the vacant lot for \$127,500. Although there were documents relating to Wall's purchase of the property, there were no writings reflecting the alleged transfer agreement between Wall and Gruys.

On October 31, 2003, Gruys caused I.R.S.C.E to issue a check payable to Welded for \$127,415.80. In a prior action, Gruys testified that the October 2003 check was payment for the interest owed on the loans made by Welded, although it is undisputed that Gruys did not include any interest income in the 2003 tax returns that he prepared for the company. In contrast, Wall testified that the check was payment for the New Mexico property that he had purchased for Gruys in October 2003. Wall admitted that he never actually transferred the property to Gruys, but asserted that it was because Gruys failed to provide him with a quitclaim deed. However, Wall later testified that he was holding the property as collateral on an additional loan that Wall made to Gruys in August 2004.

In October 2003, Gruys also caused I.R.S.C.E. to issue two checks payable to Gunderson for a total of \$5 million. Gruys testified at a prior deposition that at the time he issued the two checks, he was aware that there were insufficient funds in the I.R.S.C.E account to cover the payments to Gunderson. According to Gruys, he intended to borrow \$5 million from Wall to deposit in the I.R.S.C.E. account so that Gunderson could then cash the checks. After holding the two checks for a period of time, Gunderson attempted to cash them in January 2004, but both were returned for insufficient funds.

In April 2005, investigators from the Franchise Tax Board interviewed Wall in connection with a tax investigation involving Gunderson and Gruys. During the interview, Wall indicated that Gruys was his accountant and also had acted as his attorney in discrete legal matters. Wall described to the investigators various business dealings that he had with Gruys over the years, including real estate transactions, stock option deals, and other financial investments. He specifically discussed a joint venture with Gruys in which they orally agreed that they would jointly own two military aircraft that were being stored in a museum. Wall told the investigators that “[a]ny extra money we have we’re putting in the museum.” At trial, however, Wall denied that he and Gruys jointly owned any airplanes or airplane parts, or that Gruys had any ownership interest in the museum. Wall also denied that he and Gruys had been involved in any stock option or real estate deals apart from the purchase of the New Mexico property in October 2003.

II. The Civil Suits Against Gruys, Wall And Welded

In March 2004, Gunderson filed suit against Gruys and I.R.S.C.E. in connection with Gruys’ refusal to return \$7.5 million of Gunderson’s funds (Los Angeles County Superior Court Case No. BC311887) (the “underlying fraud action”). Following a trial, the jury found in favor of Gunderson on his claims for fraud, breach of contract, breach of fiduciary duty, and conversion. On December 11, 2006, the trial court in the underlying fraud action entered a judgment in favor of Gunderson in the amount of \$11,099,261, plus costs of suit. In an effort to collect on the judgment, Gunderson bid on a foreclosure of certain real property belonging to Gruys. However, apart from the foreclosure, Gunderson was unable to recover any portion of the judgment rendered in the underlying fraud action.

In August 2005, while the underlying fraud action was pending, Gunderson filed a separate civil suit against Gruys, Wall and Welded for fraudulent transfer in violation of

the UFTA and for conspiracy to commit a fraudulent transfer.² In his second amended complaint, Gunderson specifically sought to set aside (1) the July 2003 transfer from Gruys to Welded of \$1.2 million, and (2) the October 2003 transfer from Gruys to Welded of \$127,415.80. The complaint alleged that each of the transfers was made with the actual intent to defraud Gunderson, and had the effect of rendering Gruys insolvent and unable to pay his existing obligations. In addition to equitable relief, the complaint sought compensatory damages in the amount of the judgment in the underlying fraud action and punitive damages.

During the fraudulent transfer action, Gunderson served written discovery demands on Gruys, including form interrogatories, special interrogatories, and requests for production of documents. At the time, the California Attorney General was prosecuting both Gruys and Gunderson on felony tax charges in connection with their 2003 tax shelter plan. Gunderson's discovery requests generally sought information about any financial transactions and business dealings between Gruys and Wall. In response to such requests, however, Gruys invoked his Fifth Amendment privilege against self-incrimination and refused to provide any substantive responses or to produce any documents.

On July 10, 2007, Gunderson filed a motion to compel further discovery responses from Gruys. In his motion, Gunderson argued that Gruys' assertion of the Fifth Amendment privilege was not valid because there was no reasonable nexus between the pending criminal charges and the requested discovery. Gunderson alternatively sought an order requiring Gruys to comply with the discovery requests, or an order imposing sanctions against Gruys based on his invocation of the privilege. With respect to the requested sanction order, Gunderson specifically asked that the trial court prohibit Gruys

² Gruys' former wife, a resident of New Mexico, was also named as a defendant in the fraudulent transfer action, but was later dismissed from the lawsuit for lack of personal jurisdiction.

from either testifying or introducing any documents at trial, and that the court find against Gruys on each of his affirmative defenses.

In his opposition to the motion to compel, Gruys argued that the trial court should uphold his invocation of the Fifth Amendment privilege and narrowly fashion a remedy that would not punish him for availing himself of his constitutional rights. Gruys stated that he did not oppose a sanction order that would preclude him from testifying at trial or from asserting any of the affirmative defenses that were pleaded in his answer. He did, however, oppose an order that would prohibit him from using the documents already produced in the case by Gunderson or Wall and from using other available witnesses to attack the credibility of Gunderson's claims.

On August 9, 2007, the trial court heard Gunderson's motion to compel. After taking the matter under submission, the court found that there were sufficient grounds for Gruys' invocation of the Fifth Amendment privilege. The court therefore denied Gunderson's motion to compel, but issued a discovery sanction order that precluded Gruys from presenting any evidence, cross-examining any witnesses, or making any opening statement or closing argument at trial. In its written ruling, the court set forth its reasoning as follows:

[T]he Court finds that sufficient grounds exist for the privilege to be claimed. The question then becomes what procedural result obtains. As [Gunderson] has requested as one of the alternative grounds for relief the preclusion by Gruys from testifying or presenting evidence, as inasmuch as Gruys has agreed to this restriction, the Court orders it in the exercise of its discretion. The Court is of the opinion that further restriction be placed on Gruys in that he not be permitted to participate in the trial at all by means of opening statement, direct or cross-examination, or final argument. The knowledge that Gruys may possess that would otherwise be discoverable should not, in the Court's opinion be available to him to adduce favorable evidence at trial from witnesses or exhibits that is barred to him from presenting directly.

A jury trial in the fraudulent transfer action commenced on September 20, 2007. During the course of the trial, the trial court permitted Gruys' counsel to participate in jury selection, to object to the introduction of evidence, to confer with counsel for Wall

and Welded about his cross-examination of witnesses, and to assist in formulating jury instructions. After reconsidering its prior ruling, the court also allowed Gruys' counsel to make a closing argument at both the liability phase and the punitive damages phase of the trial. The court did not, however, permit Gruys to make an opening statement, to testify on his own behalf, to present any documentary or testimonial evidence, or to cross-examine any witnesses.³

At the conclusion of the liability phase, the jury reached a verdict in favor of Gunderson. The jury found that Gruys, Wall and Welded had engaged in a fraudulent transfer which caused Gunderson to suffer damages in the amount of \$1,712,381.28, including pre-judgment interest. The jury further found by clear and convincing evidence that Gruys, Wall and Welded had acted with malice, fraud, or oppression. Following the punitive damages phase, the jury awarded Gunderson punitive damages in the amount of \$2.4 million against Gruys, \$600,000 against Wall, and \$200,000 against Welded.

After the trial court entered judgment in Gunderson's favor, Gruys, Wall and Welded filed motions for a new trial. In his motion, Gruys argued that the punitive damages award against him was excessive as a matter of law, and that the trial court abused its discretion in issuing a sanction order that precluded Gruys from cross-examining any witnesses at trial. In their motion, Wall and Welded asserted that the punitive damages awards against them were not supported by sufficient evidence and that punitive damages, as a matter of law, were not recoverable under the UFTA. On November 29, 2007, the trial court denied the new trial motions. Gruys, Wall and Welded thereafter filed timely notices of appeal.

³ During the trial, the jury viewed portions of a videotaped recording of Gruys' deposition testimony in the underlying fraud action and also heard excerpts of Gruys' trial testimony in that prior action.

DISCUSSION

I. Appeal Of Wall And Welded

In their appeal, Wall and Welded challenge the jury verdicts on both liability and punitive damages. Specifically, they contend that the jury's finding that there was a fraudulent transfer of \$1.2 million in July 2003 was not supported by sufficient evidence because Wall and Welded were at all times good faith transferees who gave fair consideration for the transferred funds. In addition, they claim that the jury's punitive damages awards against them must be reversed because punitive damages are not available under the UFTA and because the evidence was insufficient to support the finding that they acted with malice, oppression, or fraud. As set forth below, we conclude that substantial evidence supported the jury's finding on the fraudulent transfer claim, but did not support a punitive damages award against either Wall or Welded.

A. Sufficiency Of The Evidence On The Fraudulent Transfer Finding

Wall and Welded challenge the sufficiency of the evidence supporting the jury's finding that they engaged in a fraudulent transfer of \$1.2 million in July 2003. In reviewing challenges to a verdict based on the sufficiency of the evidence, we examine the record as a whole, resolving all conflicts and indulging all legitimate and reasonable inferences in favor of the prevailing party, to determine whether substantial evidence supports the verdict. (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) "Substantial evidence" is evidence that is "reasonable in nature, credible, and of solid value. [Citations.]" (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.) If there is substantial evidence, contradicted or uncontradicted, that supports the jury's finding, it must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Western State Petroleum Assn. v. Superior Court, supra*, at p. 571 ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court"]; *Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1481 [reviewing court may not reweigh the evidence].)

Under the UFTA, a fraudulent transfer is ““a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.”” [Citation.]” (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829.) Section 3439.04 of the UFTA provides, in pertinent part, that “[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” (§ 3439.04, subd. (a)(1).) Whether a transfer was made with an actual fraudulent intent “is a question of fact and proof often consists of inferences from the circumstances surrounding the transfer. [Citation.]” (*Filip v. Bucurenciu, supra*, at p. 834.) Where the creditor establishes that the debtor’s transfer was fraudulent within the meaning of section 3439.04, the creditor is entitled to seek avoidance of the transfer to the extent necessary to satisfy the creditor’s claim and to obtain other appropriate relief. (§ 3439.07, subd. (a).)

Section 3439.08, however, sets forth a defense that is available to a transferee in an action that is based on the debtor’s actual intent to defraud under section 3439.04. Specifically, section 3439.08, subdivision (a) provides that “[a] transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value. . . .” (§ 3439.08, subd. (a).) The Legislative Committee comment to Civil Code section 3439.08, subdivision (a) states that “good faith,” within the meaning of the section, “means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee’s knowledge of the transferor’s fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee’s good faith” (Legis. Com. com., West’s Ann. Civ. Code § 3439.08.) The Legislative Committee comment further provides that “[t]he person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged.” (*Ibid.*)

Accordingly, as the parties asserting the good faith defense, the burden rested on Wall and Welded to prove to the jury that they acted without an actual fraudulent intent and that they gave reasonably equivalent value for the funds received. On appeal, Wall and Welded argue they established good faith because they presented uncontroverted evidence at trial that the \$1.2 million transfer in July 2003 constituted repayment of a prior debt that Gruys owed to Welded. At trial, Wall testified that he had loaned Gruys a total of \$2,050,000 between November 2001 and February 2002, which was more than a year before Gunderson began transferring his money to Gruys as part of their tax shelter plan. Wall further testified that Gruys's transfer of \$1.2 million to Welded in July 2003 was a partial repayment of those prior loans and included accrued interest. In support of his testimony, Wall submitted records of his three wire transfers to Gruys in 2001 and 2002, but admitted that there were no promissory notes or other documents reflecting any of the terms of the purported loans.

It is true, as Wall and Welded assert, that Wall's testimony that the July 2003 transfer was a repayment of a prior debt owed by Gruys was not rebutted by any other witness. However, as the exclusive arbiters of credibility, the jury was entitled to reject the testimony offered by Wall at trial on the grounds that it was not credible. “[S]o long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even though the witness is uncontradicted. [Citation.]” (*Filip v. Bucurenciu*, *supra*, 129 Cal.App.4th at p. 836.) In this case, there were numerous inconsistencies in Wall's testimony from which the jury reasonably could conclude that he was not telling the truth about the transfer. For instance, at trial, Wall repeatedly testified that the \$1.2 million payment from Gruys to Welded in July 2003 consisted of \$1,050,000 in principal and \$150,000 in interest. At his prior deposition, however, Wall testified that he did not charge Gruys any interest on the loans from Welded. The 2003 tax returns that Wall filed on behalf of Welded also failed to include any interest income.

Wall's trial testimony was also inconsistent with his prior admissions in other areas. In his written responses to pre-trial discovery, Wall stated that he had not made

any loans to Gruys prior to November 2001. Yet at trial, Wall testified that he loaned Gruys \$500,000 in May 2000, and that Gruys repaid the loan later that year. Likewise, in a prior declaration, Wall asserted that he had never heard of Gunderson until Gunderson filed the fraudulent transfer action against Wall and Welded in August 2005. But at trial, Wall admitted that he spoke with Gruys about Gunderson shortly after the interview with the Franchise Tax Board in April 2005, and that he knew of Gunderson when Gunderson's attorney deposed Wall in the underlying fraud action in June 2005. In addition, during his tape recorded interview with the Franchise Tax Board, Wall described numerous financial dealings that he had with Gruys over the years, including a joint venture involving two valuable military aircraft in a museum. Wall told the investigators that he and Gruys jointly owned the airplanes and were putting any additional money that they had into the museum. Wall took a contrary position at trial, however, denying that Gruys had any ownership interest in the aircrafts or any involvement in the museum apart from providing tax advice.

In challenging the sufficiency of the evidence to support the fraudulent transfer finding, Wall and Welded contend that Gunderson failed to present any evidence at trial to establish that the \$1.2 million payment was “anything other than repayment of an obligation owed” by Gruys. However, at the liability stage of the trial, the burden was not on Gunderson to prove bad faith on the part of Wall and Welded as the transferees. Rather, Gunderson's burden was to prove a fraudulent intent on the part of Gruys as the transferor. (§ 3439.04, subd. (a)(1) [“[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, . . . if the *debtor* made the transfer or incurred the obligation . . . [¶] . . . [w]ith actual intent to hinder, delay, or defraud any creditor”] (emphasis added).) Once Gunderson satisfied his burden of showing that Gruys acted with an actual intent to defraud within the meaning section 3439.04, Gunderson was entitled to relief under the UFTA unless Wall and Welded could establish that they acted in good faith within the meaning section 3439.08. (Legis. Com. com., West's Ann. Civ. Code § 3439.08 [“person who invokes this defense carries the burden of establishing good faith”].) Notably, in their appeal, Wall and Welded do not claim that the evidence was

insufficient to support the jury's finding that *Gruys* had a fraudulent intent when he transferred \$1.2 million to *Welded*. In fact, they concede in their briefing that the \$1.2 million transfer came from funds that *Gruys* had stolen from *Gunderson*. Instead, their argument on appeal is that *Wall* and *Welded* lacked any fraudulent intent because they were good faith transferees who took for fair consideration. Their argument is thus based on the good faith defense contained in section 3439.08, subdivision (a).

Given the inconsistencies in *Wall*'s trial testimony and the contradictions with his prior admissions, the jury had a rational basis for rejecting *Wall*'s testimony about the purpose of the July 2003 transfer and finding that *Wall* and *Welded* had failed to prove their good faith defense. Therefore, substantial evidence supported the jury's finding that the \$1.2 million payment from *Gruys* to *Welded* in July 2003 was a fraudulent transfer within the meaning of the UFTA.

B. Sufficiency Of The Evidence On The Punitive Damages Awards

Wall and *Welded* also challenge the jury's awards of punitive damages against them on two grounds. First, they assert that the UFTA does not allow for the recovery of punitive damages as a matter of law. Alternatively, they argue that the evidence in this case was insufficient to support the jury's finding that they had engaged in malice, oppression, or fraud. For purposes of this appeal, we need not decide whether punitive damages are an available remedy under the UFTA. Even if we assume that punitive damages are recoverable under the statute, the awards against *Wall* and *Welded* must be reversed because they were not supported by substantial evidence.

Section 3294 of the Civil Code permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (§ 3294, subd. (a).) On appeal, a jury's award of punitive damages must be upheld if it is supported by substantial evidence. (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) "As in other cases involving the issue of substantial evidence, we are bound to 'consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*,

and *resolving conflicts* in support of the judgment.’ [Citation.] (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) However, as “the jury’s findings were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains ‘substantial evidence to support a determination by clear and convincing evidence’ [Citation.]” (*Ibid.*)

Section 3294 defines malice as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (§ 3294, subd. (c)(1).) Oppression is similarly defined as “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” (§ 3294, subd. (c)(2).) Fraud under section 3294 “means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (§ 3294, subd. (c)(3).) Accordingly, to establish an entitlement to punitive damages, the plaintiff generally must prove that the defendant either intended to cause the plaintiff injury, or engaged in conduct that was both despicable and carried on with a conscious disregard of the rights or safety of others. Despicable conduct is conduct that is ““‘. . . so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.’” [Citation.]” (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.) A conscious disregard of another’s rights is demonstrated when the defendant ““‘is aware of the probable harmful consequences of its conduct and willfully and deliberately fails to avoid those consequences.’” (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 330-331.)

Mere carelessness or ignorance on the part of the defendant, on the other hand, is insufficient to support an award of punitive damages. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.) ““‘Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of

aggravation or outrage, . . . a fraudulent or evil motive on the part of the defendant, *or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.*’ [Citation.]” (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894-895.) “‘Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff’s rights, a level which decent citizens should not have to tolerate.’” (*Tomaselli v. Transamerica Ins. Co., supra*, at p. 1287.)

Here, as the party seeking punitive damages, Gunderson had the burden of proof. On this issue, Gunderson could not satisfy his burden as to Wall and Welded simply by demonstrating that Gruys had acted with a fraudulent intent. Instead, Gunderson had to establish by clear and convincing evidence that Wall and Welded either intended to cause Gunderson injury or engaged in despicable conduct in a conscious disregard of his rights. At trial, Gunderson produced evidence that, in mid-2003, he and Gruys agreed to a purported tax savings plan under which Gunderson would transfer the proceeds from the sale of his business into an account set up by Gruys solely for the purpose of receiving and then returning such funds. Gruys later refused to return \$7.5 million of Gunderson’s money, and in July and October 2003, he transferred \$1.3 million of that money to Welded. With respect to the role of Wall and Welded in Gruys’ fraudulent scheme, Gunderson submitted evidence that Wall and Gruys were close friends and had engaged in numerous financial transactions over the years in which they transferred large sums of money back and forth to one another without any supporting documentation. Gunderson also presented evidence that Wall was inconsistent in his testimony about the purpose and scope of his various transactions with Gruys, including whether the \$1.2 million payment to Welded in July 2003 included interest.

Ultimately, however, Gunderson submitted no evidence that Wall either knew or should have known that the funds transferred by Gruys did not actually belong to Gruys, but instead belonged to Gunderson. Notably, none of the evidence supported a conclusion that, at the time of Gruys’ transfers to Welded in July and October 2003, Wall had any knowledge of Gunderson or of the transfers taking place between Gunderson and Gruys. In fact, Gunderson admitted at trial that he had never met Wall before he filed his

fraudulent transfer action, had no direct business dealings with Wall, and had no personal knowledge of the relationship between Gruys and Wall. Gunderson also admitted that he did not know whether Wall had any knowledge of Gunderson's tax shelter agreement with Gruys. Gunderson was able to demonstrate at trial that Wall made a false statement in a prior declaration when he asserted that he had never heard of Gunderson before Gunderson filed suit against him in August 2005. But Gunderson's evidence on this issue only demonstrated that Wall first became aware of Gunderson around the time of Wall's April 2005 interview with the Franchise Tax Board, almost two years after the fraudulent transfers from Gruys.

Gunderson argues that Wall did not need to know the identity of the person from whom Gruys was stealing to know that he was actively participating in the theft of money. While that may be true, Gunderson did not submit any evidence that Wall knew or had reason to know that the transferred funds did not actually belong to Gruys. The two checks that were issued to Welded in July and October 2003 came from an account held in the name of I.R.S.C.E., which was a "dba" of Gruys. There was nothing in the checks themselves that would support the inference that the funds contained in that account belonged to someone other than Gruys. Furthermore, apart from the fact that Gruys and Wall were close friends, there was no evidence offered at trial to establish that Gruys ever told Wall about the underlying source of the funds or his obligation to return those funds in full.

Gunderson contends that there was sufficient evidence that Wall repeatedly lied about the nature and extent of his transactions with Gruys and that, given all of the lies, the jury reasonably could have inferred that Wall knew that Gruys was transferring money to him to conceal it from a creditor. In support of his contention, Gunderson cites to this Court's opinion in *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832 ("*Donchin*"). In *Donchin*, the victim of a dog attack sued a landlord for permitting his tenant to keep vicious dogs on the premises. (*Id.* at p. 1835.) Although the landlord initially denied knowing that his tenant had dogs, he later admitted that he was aware of the dogs, but stated in a sworn declaration that he lacked any knowledge of their violent propensities.

(*Ibid.*) The trial court granted summary judgment in favor of the landlord. (*Id.* at 1837.) On appeal, this Court reversed the summary judgment on the grounds that a jury reasonably could infer from the landlord's earlier false exculpatory statement denying any knowledge of the dogs' existence that his later statement denying any knowledge of their violent propensities was likewise false. (*Id.* at pp. 1840-1843.) We concluded that because the plaintiff had demonstrated a triable issue of fact as to whether the landlord had knowledge of the dogs' dangerous propensities, summary judgment was improper. (*Id.* at p. 1845.)

Donchin, however, is distinguishable from the instant case. *Donchin* concerned a trial court's ruling on a summary judgment motion and whether a defendant's conflicting statements about his knowledge of matters affecting his liability created a triable issue of material fact that precluded summary judgment in his favor. In this case, the issue is whether there was substantial evidence to support a finding by clear and convincing evidence that Wall knew or should have known that Welded was receiving stolen funds. As previously discussed, the inconsistencies in Wall's trial testimony reasonably could support a finding by the jury that Wall was not a credible witness and that he thus had failed to prove his affirmative defense of good faith. But none of the inconsistencies supported the inference that, at the time Welded received the two transfers from Gruys, Wall knew or had reason to know that Gruys had stolen those funds from someone else. Unlike the good faith defense for which Wall and Welded had the burden of proof, the burden rested on Gunderson to establish by clear and convincing evidence that Wall and Welded (as opposed to Gruys) were guilty of malice, oppression, or fraud. However, absent any evidence that Wall and Welded had actual or constructive knowledge that the transferred funds did not belong to Gruys, Gunderson could not satisfy his burden of proving that Wall and Welded acted with an intent to cause Gunderson injury or engaged in despicable conduct in a conscious disregard of his rights. Because there was no substantial evidence to support the jury's finding that Wall or Welded acted with any malice, oppression, or fraud in accepting the transfers from Gruys, the punitive damages awards against Wall and Welded must be reversed.

II. Appeal Of Gruys

Gruys raises two arguments on appeal. First, he contends that the trial court abused its discretion when it issued a discovery sanction order precluding Gruys from cross-examining any witnesses or presenting any evidence at trial based on his assertion of the Fifth Amendment privilege. Second, he claims that the punitive damages award against him was excessive as a matter of law because it was not proportional to his net worth at the time of trial or to the compensatory damages award. For purposes of this appeal, we need not address Gruys' arguments regarding punitive damages because we conclude that the trial court's discovery sanction order was not reasonably tailored to the circumstances of the case, and therefore, constituted an abuse of discretion.

The Fifth Amendment privilege against self-incrimination may be invoked not only by a criminal defendant, but also by a party or witness in a civil action. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 886; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 (*Alvarez*).) Indeed, a party may assert the Fifth Amendment privilege “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory’ [Citations.]” (*Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 688 (*Pacers*).) “[M]atters which are privileged are outside the scope of discovery and a court may not make an order compelling an individual to make responses which that person reasonably apprehends could be used in a criminal prosecution of him or which could at the least lead to evidence that might be so used. [Citations.]” (*A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566 (*A & M Records*).)

While the Fifth Amendment privilege of a criminal defendant is absolute, a party or witness in a civil proceeding “may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it. [Citations.]” (*Alvarez, supra*, 158 Cal.App.3d at p. 712.) There is a broad range of civil sanctions that may be imposed on a litigant who asserts his or her Fifth Amendment right, but the severity of such sanctions generally depends on whether the party invoking the privilege is the plaintiff or the defendant. (*Id.* at pp. 712-713; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 559-560.) Where the plaintiff in a civil action claims the

privilege and refuses to testify, the court may dismiss the action on the basis that “[o]ne may not invoke the judicial process seeking affirmative relief and at the same time use the privileges granted by that process to avoid development of proof having a bearing upon his rights to such relief.” [Citation.]” (*Alvarez, supra*, at p. 712; see also *Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1432 [“courts have never allowed a plaintiff to use . . . the self-incrimination privilege as a ‘shield and as a sword’”].) The rule is different, however, where the defendant is the party invoking the privilege because “defendants are forced to partake of the action if they would defend their interests.” (*Alvarez, supra*, at pp. 712-713.) Courts thus must “recognize the dilemma faced by a defendant who must choose between defending the civil litigation by providing testimony that may be incriminating on the one hand, and losing the case by asserting the constitutional right and remaining silent, on the other hand. [Citation.]” (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 306 (*Fuller*).) At the same time, courts must also consider the interests of the plaintiff who is “entitled to an expeditious and fair resolution of [his or her] claims without being subjected to unwarranted surprise.” (*Ibid.*)

Accordingly, where a civil defendant has properly invoked the Fifth Amendment privilege, courts “have responded with various procedural solutions designed to fairly balance the interests of the parties and the judicial system.” (*Fuller, supra*, 87 Cal.App.4th at p. 307.) Under such circumstances, the trial court must carefully weigh the parties’ competing interests and fashion an order that fairly accommodates the interests of both parties to the extent possible. (*Fuller, supra*, at pp. 307-308; *Pacers, supra*, 162 Cal.App.3d at p. 690.) While the court should take steps to ensure that the plaintiff is protected against undue surprise at trial, its order should not have the effect of penalizing the defendant for exercising a fundamental constitutional right. (*Fuller, supra*, at pp. 308-309; *Pacers, supra*, at p. 689.) The trial court’s discovery sanction order generally is reviewed for an abuse of discretion. (*Fuller, supra*, at p. 304; *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 175.)

One accommodation that has been developed by the courts is to stay the civil proceedings until disposition of the related criminal prosecution. (*Fuller, supra*, 87

Cal.App.4th at pp. 307-308; *Pacers*, *supra*, 162 Cal.App.3d at p. 690.) In *Pacers*, for instance, the defendants in a civil action invoked the Fifth Amendment privilege at their depositions due to threatened criminal charges. (*Pacers*, *supra*, at p. 688.) Based on the defendants' refusal to respond to any deposition questions, the trial court issued a sanction order that precluded them from testifying at trial "as to all matters forming the subject matter" of the civil suit. (*Ibid.*) The Court of Appeal issued a peremptory writ of mandate directing the trial court to set aside its order and to stay the depositions until after the expiration of the criminal statute of limitations. (*Id.* at pp. 690-691.) The appellate court concluded that the trial court had abused its discretion in issuing a sanction order that only protected the plaintiffs because the order had the effect of punishing the defendants for exercising their constitutional rights. (*Id.* at p. 689.) As reasoned by the Court of Appeal, "[w]e are not confronted here with a party who wilfully deprives his adversary of information or whose use of obstructive tactics in discovery subjects the adversary to unfair surprise at trial. . . . [¶] . . . Where, as here, a defendant's silence is constitutionally guaranteed, the court should weigh the parties' competing interests with a view toward accommodating the interests of both parties, if possible. An order staying discovery until expiration of the criminal statute of limitations would allow [the plaintiffs] to prepare their lawsuit while alleviating [the defendants'] difficult choice between defending either the civil or criminal case. [Citation]." (*Id.* at pp. 689-690; see also *Fuller*, *supra*, at pp. 308-309 [trial court properly denied plaintiffs' request for an order prohibiting defendants from testifying at trial based on their assertion of their Fifth Amendment rights because such an order "would have the unacceptable effect of penalizing [defendants] for exercising their constitutional privilege"].)

Another possible accommodation is to preclude a civil defendant who claims the Fifth Amendment privilege in discovery from testifying at trial about matters as to which the privilege has been asserted. (*Fuller*, *supra*, 87 Cal.App.4th at p. 308; *A & M Records*, *supra*, 75 Cal.App.3d at p. 566.) In *A & M Records*, the defendant in a civil suit refused to produce any documents or to answer any substantive questions at his deposition based on his invocation of the Fifth Amendment privilege. (*A & M Records*, *supra*, at p. 564.)

In response, the trial court issued a sanction order prohibiting the defendant from introducing at trial any documents that he had failed to produce in discovery and from testifying at trial about any matters for which he had refused to answer questions at his deposition. (*Id.* at p. 565.) The Court of Appeal affirmed on the grounds that “[t]he action taken by the trial court was a fair and just resolution of the problem. . . . [The defendant] was precluded from testifying at trial only on matters upon which he had asserted in discovery his privilege against self-incrimination. He was not prevented from testifying concerning matters as to which he had been forthcoming nor was he prevented from presenting documentary evidence or the testimony of other witnesses to support his defenses.” (*Id.* at p. 566.)

On the other hand, courts have held that an order which precludes a civil defendant from presenting any evidence or cross-examining any witnesses based on his or her assertion of the Fifth Amendment privilege is too harsh a sanction for the exercise of such a fundamental constitutional right. In *Alvarez*, the defendants invoked the privilege against self-incrimination at trial and refused to answer questions during the plaintiffs’ examination. (*Alvarez, supra*, 158 Cal.App.3d at p. 712.) In response, the trial court granted the plaintiffs’ motion to strike the portion of the defendants’ answer that constituted denials and directed the case to proceed as a default matter. (*Id.* at p. 711.) Following the trial court’s ruling, the plaintiffs called numerous witnesses to testify in support of their claims. (*Ibid.*) The trial court denied the defendants’ requests to cross-examine the plaintiffs’ witnesses and to call other witnesses to rebut the plaintiffs’ evidence. (*Ibid.*) The Court of Appeal held that the trial court’s ruling constituted prejudicial error because it had the effect of denying the defendants “their day in court.” (*Id.* at p. 712.) As the Court of Appeal explained, the “striking of the answer and resultant proceeding by default gave [the plaintiffs] a totally unjustified advantage in proving their claim, for it prevented their proof from being tested by cross-examination, and by contrary evidence, both testimonial and documentary. Such conduct by the trial court effectively denied [the defendants] their fundamental right to a trial simply because they invoked their constitutional right.” (*Id.* at pp. 714-715.)

In this case, the trial court concluded that Gruys had properly invoked his privilege against self-incrimination in discovery given the pending criminal charges against him. However, instead of fashioning an order that carefully balanced the interests of both Gunderson and Gruys, the trial court issued a blanket sanction order that effectively precluded Gruys from participating at trial in any meaningful way. Unlike the discovery order in *A & M Records*, the trial court's order here did not merely prohibit Gruys from introducing documents that he had refused to produce in discovery or from testifying at trial about matters for which he had asserted the privilege. The order issued in this case extended much further, as it also barred Gruys from calling any witnesses on his behalf, from cross-examining any witnesses called by Gunderson, and from presenting any evidence whatsoever to counter Gunderson's claims. Gruys was not even permitted to examine Gunderson's witnesses about documents that already had been admitted into evidence through other parties. As a result, the sanction order went beyond what was reasonably required to protect Gunderson from unwarranted surprise at trial. By prohibiting Gruys from presenting any evidence or conducting any cross-examination, the trial court's order had the effect of denying Gruys the right to defend the action at all. (See *Thomas v. Luong* (1986) 187 Cal.App.3d 76, 81 [discovery sanctions "should not deprive a party of all right to defend an action if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide discovery"]; *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305 ["While . . . the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law"].)

None of the arguments raised by Gunderson in his respondent's brief have merit. Gunderson claims that Gruys' motive for invoking the Fifth Amendment privilege was not to protect himself from self-incrimination, but to protect his assets from Gunderson's attempts to collect on a prior judgment. However, in denying Gunderson's motion to

compel further discovery responses, the trial court found that there were sufficient grounds for Gruys to assert his Fifth Amendment right, and that ruling has not been challenged by Gunderson on appeal. Consequently, the issue before this Court is not whether Gunderson properly invoked the privilege against self-incrimination, but whether the resulting sanction order was an abuse of discretion. Gunderson also contends that Gruys was properly denied the right to cross-examine witnesses because Gruys failed to prove how he could conduct a cross-examination without obtaining an unfair advantage over Gunderson. But Gunderson fails to explain how allowing Gruys to examine witnesses about matters that were already on the record would cause Gunderson any prejudice or undue surprise. Moreover, the trial court's sanction order did not simply prohibit Gruys from testifying or presenting evidence about matters not disclosed to Gunderson in discovery, but precluded Gruys from presenting any defense at all. Gunderson also suggests that Gruys suffered no prejudice as a result of the sanction order because counsel for Wall and Welded was able to cross-examine Gunderson's witnesses on the subjects that Gruys claims he would have pursued at trial. However, counsel for Wall and Welded did not represent Gruys in the civil action and did not have any duty to defend Gruys' rights or interests. Thus, any similarities in the defenses that the parties might have proffered at trial did not protect Gruys' individual right to present a defense.

Once Gruys properly invoked the privilege against self-incrimination, the trial court had a duty to balance the interests of both parties and to fashion an order that could fairly accommodate their competing interests. The sanction order issued in this case clearly protected Gunderson's right to be safeguarded from unfair surprise at trial, but it did not give due consideration to Gruys' constitutional right to remain silent. Instead, by prohibiting Gruys from presenting any evidence or cross-examining any witnesses, the trial court effectively forced Gruys to choose between his Fifth Amendment privilege and any meaningful chance to defend against Gunderson's claims. The trial court penalized Gruys for exercising his constitutional privilege and deprived Gruys of his fundamental right to a trial. (*Pacers, supra*, 162 Cal.App.3d at p. 689; *Alvarez, supra*,

158 Cal.App.3d at p. 714-715.) Under such circumstances, the trial court's discovery sanction order constituted an abuse of discretion.

For these reasons, the judgment against Gruys must be reversed and the matter remanded to the trial court for a new trial on Gunderson's claims against Gruys. On remand, the trial court is directed to set aside its discovery sanction order and to issue a new order that properly balances the interests of both parties in accordance with applicable legal precedent.

DISPOSITION

The awards of punitive damages against Wall and Welded are reversed. In all other respects, the judgments against Wall and Welded are affirmed. The judgment against Gruys is reversed and the matter remanded to the trial court for a new trial on Gunderson's claims against Gruys. On remand, the trial court is directed to set aside its discovery sanction order and to issue a new order imposing appropriate discovery sanctions against Gruys in accordance with this opinion. Appellants shall recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.